Supreme Court, U.S.
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No. _____

In The
Supreme Court of The United States
October Term 1998

SAMUEL MADDEN HOMES TENANT COUNCIL

Petitioner,

v.

ALEXANDRIA RESIDENT COUNCIL, INC.

Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

In a case of first impression, whether the legislatively mandated right to purchase public housing slated for demolition or disposition may be denied the residents who reside at the affected development or portion thereof and awarded to a jurisdiction-wide resident council on the basis that the latter was previously recognized as a resident council by the Public Housing Authority?

Whether the proscription contained in 24 C.F.R. § 964.18(a)(7)precludes, or otherwise impacts upon the specific mandate set forth in 24 C.F.R. § 970.13(b)?

Whether the right to purchase, aforesaid, may be denied the residents on the basis that the Housing Authority, in a contract to which the residents were not a party, contracted to sell the property to a third party in the event of demolition or disposition?

II. LIST OF PARTIES TO THE PROCEEDING

1. Petitioner (previous Appellant), Samuel Madden Homes Tenant Council, a/k/a Samuel Madden Homes Cooperative, Inc.

2. Respondent (previous Appellee); Alexandria Resident Council, Incorporated.

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2. The Opinion of the District Court in *Alexandria Resident Council v. Alexandria Redevelopment and Housing Authority et.al.* is reported at 979 F. Supp. 409 (E.D.VA. 1997)

VI. STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit filed its unpublished opinion in the case below on July 22, 1998. Pursuant to Circuit Rules 35 and 40, Petitioner timely filed a combined petition for rehearing and suggestion for rehearing *in banc* on August 3, 1998. Petitioner's request for rehearing and rehearing *in banc* were denied by the United States Court of Appeals below by its order filed on August 17, 1998, and the instant petition is being filed within 90 days of that denial. The Supreme Court has jurisdiction to review this matter pursuant to 28 U.S.C. § 1254(1).

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VIII. STATEMENT OF THE CASE

A. Introduction-Factual and Regulatory Background

The facts of this 42 U.S.C. § 1437P(b)(1) case of first impression are not in dispute. The fundamental question in this case is whether the Petitioner, the resident organization consisting of residents of a public housing development slated for demolition, is entitled to an offer to purchase that property, or whether, as decided by the district court and affirmed by the U.S. Court of Appeals for the Fourth Circuit, the Housing Authority must make the offer to a pre-existing city-wide resident organization. To fully appreciate the significance of the issues presented by this case, it is essential to consider its lengthy procedural background.

On March 25, 1996, the Alexandria Redevelopment and Housing Authority ("ARHA") voted to demolish a 110-unit public housing development located in the City of Alexandria, Virginia, known as Samuel Madden Homes "Downtown", often referred to as the "Downtown Homes"[1]. Pursuant to 42 U.S.C. § 1437P(b)(1) and 24 C.F.R. § 970.13(b), ARHA informed the residents of the Downtown

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[1]The other portion of the amual Madden Homes, which is physically separated from the Downtown Homes, consists of sixty-six units located some six blocks away, is not affected by the application for demolition. that portion is referred to as the "Uptown Homes."

Homes of their right to organize and purchase the property proposed for demolition. Upon the subsequent formation of the Petitioner, Samuel Madden Homes Tenant Council ("SMHTC"), ARHA extended formal recognition to SMHTC as the resident organization at the affected development and made the formal offer to SMHTC in accordance with 24 C.F.R. § 970.13(d).[2] For years prior to the 1996 decision to demolish and redevelop the Downtown Homes, ARHA maintained a relationship with the respondent, Alexandria Resident Council (ARC), who ARHA recognized as the voice of authority-wide residents for input into housing authority policy, operations, general management, resident training, and other services to and for all public housing residents, including the residents of the Downtown Homes, but excluding one single development.

On March 27, 1997, ARC instituted this action in the United States District Court for the Eastern District of Virginia, alleging that it (ARC) was entitled to the opportunity to purchase the Downtown Homes under 42 U.S.C. 1437p(b)(1) and a so-called Memorandum of Understanding between ARC and ARHA, and that ARHA's refusal to grant such opportunity to purchase constituted a violation of ARC's rights pursuant to 42 U.S.C. § 1983 and a

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[2]The terms "resident" and "tenant" are equivalents as well as the terms "resident organization", and "tenant organization" and are used interchangeably throughout Part 970 of 24 C.F.R. *See* §§ 970.4, 970.13(b), 970.115(d).

breach of the Memorandum of Understanding.

On April 28, 1997, the Petitioner filed a motion to intervene as a party defendant, which the district court granted on May 16, 1997. On July 17, 1997, ARC filed a motion for summary judgment, which the district court took under advisement, after an oral argument. On August 8, 1997, the Petitioner, SMHTC filed a motion to dismiss the action pursuant to F.R.C.P. 12(b)(6), alleging principally that ARC does not meet the most rudimentary requirements of 24 C.F.R. § 964.115, as ARC is organized as a non-profit corporation without members.[3]

In a published Memorandum and Order dated September 24, 1997, the district court granted ARC's motion for summary judgment and denied Petitioner's motion to dismiss. *See, Alexandria Resident Council v. Alexandria Redevelopment and Housing Authority*, 979 F. sup. 409, 415-16 (E.D.Va. 1997), ruling that ARC, rather than Petitioner, is entitled under Federal law and the Memorandum of Understanding to offer to purchase the Downtown Homes. Apdx. B.

On October 20, 1997, Petitioner filed a motion for relief from judgment pursuant to F.R.C.P. 60(b)(6) based upon an opinion, by the Office of General Counsel,

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[3]24 C.F.R. § 964.115 required that a resident council as envisioned under that section, must meet each of several requirements, among which is that it must have voting members. *See* 24 C.F.R. § 964.115(b), 24 C.F.R. § 964.115(c).

Department of Housing and Urban Development requested prior to, but received after, the district court's ruling, setting forth the Department's interpretation of the applicable statute and regulations that the offer to purchase must be made:

> to the tenants of the *affected project* (e.g. those tenants residing in the project or that portion of the project proposed for demolition of (sic) disposition.) (Emphasis in original).

The district court rejected that interpretation in favor of its own interpretation of the statute and regulations, and denied Petitioner's motion for relief.[4]

Petitioner filed timely notices of appeal from both the district court's orders, which appeals were argued before a three-judge panel of the U.S. District Court of Appeals for the Fourth Circuit, who in an unpublished per curiam opinion filed on July 22, 1998, affirmed the U.S. District Court's grant of summary judgment to ARC and denial of Petitioner's motion for relief from judgment under Rule 60(b)(6) F.R.C.P., ruling that "Because we conclude that 24 C.F.R. §

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[4]The district court finds that "The purpose of the HUD regulations cannot be to give rise to the formation of a resident council for the sole purpose of which would be to make an offer to purchase. To interpret them as such would be to subvert the entire policy behind the role of a resident council. *See* 24 C.F.R. § 964.100". As will be shown, that is precisely what the purpose of the HUD regulations is. *See*, also 24 C.F.R. § 970.13(i)(3)(i).

964.18(a)(7) directly applies, we affirm the district court's judgment in favor of ARC." Apdx. A.

On August 3, 1998, Petitioner filed a Petition for Rehearing and Suggestion for Rehearing *In Banc*, which petition was denied in an Order of the U.S. Court of Appeals for the Fourth Circuit filed August 17, 1998. Apdx. A.

Summary of Argument

In arriving at its affirmance of the district court's conclusion that ARC is entitled to the offer to purchase the property, rather than the Petitioner, the Court of Appeals, as did the district court, relies upon 24 C.F.R. § 964.18(a)(7) as precluding the recognition of Petitioner by the Housing Authority as the resident organization entitled to receive the offer to purchase.

In fact, the Court concludes that 24 C.F.R. 964.18(a)(7) "directly applies" to this cause because the record is clear that, for nearly ten years, ARHA recognized ARC as the official resident council representing the Downtown Homes. In a description of ARC, found on page 4 of the unpublished opinion, the Court accurately finds that:

> ARC is a resident council that represents public housing units *throughout Alexandria* . . . . Prior to the formation of SMHTC described below, there were no other resident

> councils in existence in Alexandria besides ARC and LAC. (Emphasis added)

Apdx. A. The Court Continues:

> Since its formation, ARC has acted as the local resident Council for *all housing projects in Alexandria* except Ladrey (Emphasis added).

In describing ARC's activities regarding "all Housing projects in Alexandria, except Ladrey" the Court finds:

> In this capacity, ARC has conducted self-help programs such as crime patrols, anti-drug sit-ins, anti-loitering campaigns, prayer vigils, cookouts and community days.

Apdx. A.

Those activities, which the court acknowledges are on a city-wide basis, do not entitle ARC to the right to purchase, which right is triggered only upon the demolition or disposition of a particular project or portion thereof. Nor do the residents of that project or portion earmarked for demolition or disposition forfeit their rights under 24 C.F.R. § 970.13 simply because ARC was in existence and providing those city-wide services prior to the formation of the Petitioner.

The appeals court's determination that 24 C.F.R. § 964.18(a)(7) directly applies and that, therefore, ARC is the only organization that may receive the offer of first refusal to purchase the Downtown Homes is unsupportable. Both ARC's description and its activities make it clear that despite what it is called, it is clearly not "the residents of the development proposed for demolition or disposition" whom the Housing Authority is required to inform of their right to purchase and provide the opportunity to organize and purchase the property, as set forth in 24 C.F.R. § 970.13(b).

REASONS FOR GRANTING THE WRIT

I

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE CLEAR INTENT OF CONGRESS, THE ACT AND THE REGULATIONS, THE PRIOR RULINGS OF THIS COURT, AND THE AGENCY'S INTERPRETATION OF ITS STATUTE.

SMHTC's petition for writ should be granted because the opinion below conflicts with this Court's important prior rulings on the question of a court's review of an agency's construction of the statute which it administers. In such case, the court is confronted with two questions. The first question

is whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Chevron USA, Inc. v. National Resources Defense Council, Inc., et. al.* 467 U.S. 837; 104 S. Ct. 2778; 81 L. Ed. 2d.694 (1984).

In this case the Congressional intent is clear, and the opinion below must be reversed. Fundamentally, 42. U.S.C. § 1437p(b)(1) limits the approval of an application for demolition or disposition to those applications in which it can be shown that the application has been developed in consultation with tenants and tenant council, if any, who will be *affected by the demolition or disposition,* and that the tenant council of the project or portion of the project covered by the application, if any, have been given appropriate opportunities to purchase the project or portion of the project covered by the application. (Emphasis added)

As further evidence of Congress' intent with respect to public housing demolition and disposition, the Housing and Community Development Act of 1992, P.L. 102-550, in Section 115, thereof clarifies that the consultation under Section 18(b) of the 1983 Housing Act must occur with the *tenants* of the project or portion of the project covered by the demolition and disposition application (Emphasis added). Apdx. C.

On January 18, 1995, a further clarification appears at

page 3706 of volume 60 of the Federal Register, requiring PHA's to limit the opportunity to purchase the development or portion of the development proposed for demolition or disposition *only* to the resident organizations at the affected development (Emphasis added), clarifying what the legislature deemed "an ambiguity regarding the breadth of the offer." Apdx. C.

In response to the aforestated revisions, the Secretary of Housing and Urban Development issued NOTICE PIH 93-17 (PHA) dated April 2, 1993, advising Public Housing Agencies that they are required to offer the property proposed for demolition or disposition *exclusively* to the resident organizations *in* the affected development. (Emphases added). Apdx. C.

In response to a request for further clarification by Petitioner to the Secretary of Housing and Urban Development, the Office of General Counsel, HUD responded:

> The clear intent of Section 18 is to require that PHA's give the tenants of the *affected project* (e.g. those tenants residing in the project or portion of the project proposed for demolition or disposal an opportunity to purchase. A PHA or jurisdiction-wide resident organization does not have a right to purchase under Section 18. (Emphasis in original).

In the face of this overwhelming evidence to the contrary, all of which is in the record below, the Court finds that ARC is the only organization that may receive the offer of first refusal to purchase the Downtown Homes.

A secondary reason given for the ruling in favor of ARC is that "The latest Memorandum of Understanding contractually gives ARC the right of first refusal to purchase the Downtown Homes". *See Alexandria Resident Council*, 979 F. Supp. at 414-15. Apdx. A. Both the district court and the Court below impermissibly construe that document, to which no resident or resident organization at the Downtown Homes is a party, as an effective and lawful (Apdx. A; Apdx. B) transfer of the residents' rights. The only methods by which those rights may be lost are by a knowing waiver pursuant to 24 C.F.R. § 970.13(i)(3)(ii)(A) or failure of the residents to respond to the offer, certified by the executive director or Board of Commissioners of the Public Housing Authority, as outlined in 24 C.F.R. § 970.13(i)(3)(ii)(B). There simply is no merit to the Court's finding otherwise.

II

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW IMPERMISSIBLY EXPANDS THE COVERAGE AND SCOPE OF 24 C.F.R. 964.18(a)(7)

In its opinion of July 22, 1998, the court below affirms

the district court's ruling on the single basis that:

> Because we conclude that 24 C.F.R. § 964.18(a)(7) directly applies, we affirm the district court's judgment in favor of ARC.

The court's reliance upon that Section, which does not apply, directly or otherwise, to the right to purchase, is misplaced. The "explanation" section appearing on page v. of Title 24 of the Code of Federal Regulations contains the following language which is particularly applicable to this petition:

> . . . . . This code is divided into 50 titles which represent broad areas subject to federal regulations. Each title is divided into chapters which usually bear the name of the issuing agency. Each Chapter is divided into *parts* covering *specific regulatory areas.* (Emphases added)

Section 964.18(a)(7), relied upon by both courts below is found in "Part 964-Tenant Participation and Opportunities in Public Housing", specifically, "Subpart A-General Provisions," the purpose of which, is therein stated, at 24 C.F.R. § 964.1 "to recognize the importance of resident involvement in creating a positive living environment and

actively participating in the overall mission of public housing."

The Title of Section 964.18 is "HA role in activities under subparts B & C". Subsection (a) of 964.18 is made applicable in that ARHA has more than 250 units of public housing. Subpart B is entitled "Tenant Participation" and describes the interaction between the Housing Authority and the resident Council on ongoing matters of common interest to all public housing residents under the Housing Authority's control. Subpart C is entitled "Tenant Opportunities Program", and pertains to a specific program which is available to eligible resident councils/resident management corporations as defined therein. So it is clear that §964.18 applies only to activities under subparts B&C, all of which are under Part 964, whose specific regulatory area is ongoing resident activities of the type attributed to ARC.

With specific focus on 24 C.F.R. 964.18(a)(7) both courts below, while relying upon that section, focus only on the first sentence, and overlook the second, which, consistent with the purpose stated in 964.1, limits 964.18(a)(7) to activities and resident input into ongoing operations. Apdx. C. The reason for the stricture contained in the first sentence is, obviously, to insure uniformity and consistency in the types of programs, training, and activities envisioned under Part 964; to insure accountability of the funding envisioned in the second sentence; to have a single organization which the Housing Authority recognizes as the voice for public

housing residents in its jurisdiction. To do otherwise would be to invite a patchwork of inconsistency, confusion and waste.

The right to purchase is found in Part 970 of Chapter 24, Code of Federal Regulations, and as stated in the explanation to the code, covers a specific regulatory area. As shown in Argument I, and the Act, the Regulations and specific clarifications require the Housing Authority to offer to the tenants residing at the project or portion of the project to be demolished or disposed of, the right to purchase, and if there is no resident organization, the Authority is required to give the residents time and the opportunity to organize for the express purpose of exercising the right to purchase. *See* 24 C.F.R. § 970.13(b).

The right to purchase is triggered only upon the event of demolition or disposition of public housing, and is exclusively the right of the resident council affected by the demolition or disposition, which is not a "competing resident council" as that term is envisioned under 964.18(a)(7) which, as has been shown, has no application to any of the legislated rights under 24 C.F.R. § 970.13 or any other provision contained in Part 970 or any of the other Parts 901-990 comprising Chapter 24 of the Code of Federal Regulations.

The Court's conclusion that 24 C.F.R. § 964.18(a)(7)directly applies to the instant case is contrary to the law and cannot be supported. As has been more than amply shown, Part 964 covers its specific regulatory area

(ongoing city-wide operational concerns) while Part 970 covers its separate and distinct regulatory area (demolition or disposition of specific public housing), neither part having any relationship to the other, nor conferring any rights or responsibilities outside of its specific area.

CONCLUSION

This case presents a question of exceptional importance -- whether a district court judge upheld by a Circuit Court, shall be allowed to circumvent the clear, contrary intent of Congress, ignore this Court's ruling in *Chevron*, and take away congressionally mandated rights from virtually defenseless public housing tenants. If the opinion below is allowed to stand, all public housing residents within the Eastern District of Virginia, the Fourth U.S. Circuit, and perhaps the entire nation, will see their substantial property rights taken away without due process of law. By granting SMHTC's petition for a writ of certiorari, this Court can correct the Fourth Circuit's decision, which defies this Court's long-standing holding that when the clear intent of Congress is evident, there is nothing for the court to decide. In so doing, this Court can also restore to public housing residents the important right to purchase the properties in which they reside when those properties are proposed for demolition or disposition. Otherwise, Part 970 would be a total illusion, no other public housing residents

could in the future form a resident council, no public housing which ARC purports to represent could ever free themselves from that representation, ARHA would be bound to offer only to ARC any public housing it proposes for demolition or disposition, in the future ARC would enjoy a court-imposed monopoly on all such housing, and Public Housing Agencies everywhere would be bound to the same fate as ARHA.

Accordingly, the Samuel Madden Homes Tenant Council, on its behalf and on behalf of all public housing residents, nationwide respectfully requests that its petition for writ of certiorari be granted so that this crucial matter might be brought before this Honorable Court for a prompt and just resolution.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ALEXANDRIA RESIDENT COUNCIL, INCORPORATED, *Plaintiff-Appellee,*	)	
v.	)	
SAMUEL MADDEN HOMES TENANT COUNCIL, a/k/a Samuel Madden Homes Cooperative, Incorporated, *Defendant-Appellant,*	)	No. 97-2501
and	)	
ALEXANDRIA REDEVELOPMENT & HOUSING AUTHORITY, *Defendant.*	)	

ALEXANDRIA RESIDENT COUNCIL, INCORPORATED, *Plaintiff-Appellee,*	)	
v.	)	
ALEXANDRIA REDEVELOPMENT & HOUSING AUTHORITY, *Defendant-Appellant.*	)	

and	)	
SAMUEL MADDEN HOMES	)	
TENANT COUNCIL, a/k/a	)	
Samuel Madden Homes	)	No. 97-2502
Cooperative, Incorporated,	)	
Defendant.	)	

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Leonie M. Brinkema, District Judge.
(CA-97-427-A)

Argued: June 3, 1998

Decided: July 22, 1998

Before NIEMEYER and HAMILTON, Circuit Judges, and
FABER, United States District Judge for the
Southern District of West Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Horace McClerkin, Alexandria, Virginia; Michael Jay Weiser, Alexandria, Virginia, for Appellants. Paul

Anthony Fiscella, Alexandria, Virginia, for Appellee. **ON BRIEF:** Victor M. Glasberg, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

This case involves a turf war between two "resident councils," each purporting to represent tenants of a public housing project in Alexandria, Virginia, the Samuel Madden Downtown Homes (the Downtown Homes), which is scheduled to be demolished. After Appellant Alexandria Redevelopment and Housing Authority (ARHA), the public housing authority for the City of Alexandria, offered to allow Appellant Samuel Madden Homes Tenant Council (SMHTC) to purchase the Downtown Homes pursuant to 42 U.S.C. § 1437p(b) and 24C.F.R. § 970.13, Appellee Alexandria Resident Council, Inc. (ARC) sued for a declaration that ARC was the entity entitled to receive an offer of first refusal to purchase the Downtown Homes. ARHA and SMHTC are appealing from the district court's grant of ARC's motion for

summary judgment, and from the district court's denial of SMHTC's motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) and for relief from judgment under Federal Rule of Civil Procedure 60(b)(6). We affirm.

I

The housing project at issue in this case is a complex called the Samuel Madden Homes, a 166-unit brick townhouse development in Old Town Alexandria. ARHA owns and manages the complex, and leases the units at reduced rates to eligible low-income persons, and receives rent subsidies from HUD. This action involves a 100-unit portion of the Samuel Madden Homes known as the"Downtown Homes" which ARHA has determined should be demolished.[1]

When a local housing authority (HA) wishes to sell, demolish or otherwise dispose of a public housing project, the HA must apply to the Secretary of HUD for approval. See 42 U.S.C. § 1437p. To receive approval, the HA is required, inter alia , to consult with the tenants and resident councils that will be affected by the demolition or disposition, and to give the resident council of the project the opportunity to

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[1]The other portion of the Samuel Madden Homes, which is not set for demolition and is not at issue in this case, consists of sixty-six units some three blocks from the Downtown Homes and is known as the "Uptown Homes."

purchase the project. See 42 U.S.C. § 1437p(b)(1); 24 C.F.R. § 970.13. If the affected housing project does not have an existing resident council, the regulations require the HA to make reasonable efforts to inform the residents of their opportunity to organize and purchase the property. See 24 C.F.R.§ 970.13(b).

Resident councils[2] are organizations comprised of the residents of public housing projects, and are intended to work with the local HA to help create a positive living environment for public housing residents. See generally 24 C.F.R. Part 964. The HUD regulations define two types of resident councils: (1) the "jurisdiction-wide" or "HA-wide" resident council, which represents the interests of all residents residing under an HA's jurisdiction, see 24 C.F.R. § 964.105; and (2) the "local" resident council, the purpose of which is to improve the quality of life and resident satisfaction and sponsor self-help initiatives to enable residents of a complex to create a positive living environment, see 24 C.F.R. § 964.100. The role of the HA-wide council is to advise the HA in all areas of public housing operations, including but not limited to occupancy, management, maintenance, security, resident training and employment, social services and modernization priorities. See 24 C.F.R. § 964.105(b). Local resident councils, on the other hand, represent residents in a

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[2]The terms "resident council" and "tenant council" are equivalents and may be used interchangeably. See 24 C.F.R.§ 964.3(e).

local housing community, although the definition of a local resident council is quite loose. See 24 C.F.R. § 964.115(a) (stating that a local resident council can represent residents residing in scattered site buildings, areas of contiguous row houses, in one or more contiguous buildings, in a development, or in a combination of these buildings or developments).

ARC is a resident council that represents public housing residents throughout Alexandria. ARC was formed in 1988 to represent all of Alexandria's public housing tenants, except for those at the Ladrey Seniors Highrise (Ladrey) who were already represented by the Ladrey Advisory Council (LAC).[3] ARC's articles of incorporation and by-laws establish a five-member board of directors that is elected by the housing projects' residents for three-year terms. The articles and by-laws also provide for the recall of board members by a majority vote of residents eligible to vote. Prior to the formation of SMHTC described below, there were no other resident councils in existence in Alexandria besides ARC and LAC.

Since its formation, ARC has acted as the local resident council for all housing projects in Alexandria except Ladrey. In this capacity, ARC has conducted self-help

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[3]The record indicates that ARHA has 900 public housing units in Alexandria, of which 200 are represented by LAC. That means, of course, that ARC represents 700 units, 100 of which are in the Downtown Homes.

programs such as crime patrols, anti-drug sit-ins, anti-loitering campaigns, prayer vigils, cookouts and community days. However, because ARC represents the vast majority of public housing residents in Alexandria, ARC also has attributes of, and has acted as, the HA-wide resident council. In this capacity, ARC has worked with ARHA to obtain annual inspections and has held periodic meetings with ARHA regarding maintenance. As a result, ARC appears to have acted simultaneously as both an HA-wide resident council and a local resident council.

For nearly ten years, ARHA has continually recognized and treated ARC as the local resident council representing the Downtown Homes. ARHA has provided ARC with a vacant unit in the Samuel Madden Homes for use as an office, and has always provided ARC with per-unit funding that included the Downtown Homes. Moreover, in 1989, ARHA entered into a "Cooperation Agreement" with ARC that explicitly identified ARC as the "officially recognized resident organization." (J.A. 172). In 1991, ARHA and ARC entered into a Memorandum of Understanding that set forth the terms of their partnership agreement regarding the provision of programs and services to the public housing residents ARC represents. That Memorandum of Understanding was only the first of several such agreements, the latest one having been concluded on December 17, 1996. This latest Memorandum of Understanding established as one of its five "goals" "[t]o

make available to ARC (in accordance with HUD's regulations when pre-existing conditions provide for the sale of any ARHA property, first right of refusal to purchase." (J.A. 21) (unmatched parentheses in original).

In 1994, ARHA convened a task force to study the options regarding the "redevelopment" or "rehabilitation" of the Downtown Homes. "Redevelopment" is a euphemism which implies that the housing complex will be destroyed or otherwise converted to non-public housing, whereas "rehabilitation" implies that the complex will be remodeled. In this context, the residents of a "redeveloped" public housing project are displaced, while residents of a "rehabilitated" complex typically return to their homes once the remodeling is completed. ARC favored rehabilitating the Downtown Homes, but the task force was divided. On March 25, 1996, ARHA voted to redevelop the Downtown Homes.

Despite having already recognized ARC as the resident council representing the Downtown Homes, on August 15, 1996, ARHA issued a "Notice of Opportunity to Organize" to the residents of the Downtown Homes, stating that "[b]ecause ARC represents all ARHA public housing residents, ARC does not qualify as the resident organization representing [Downtown Homes] residents." (J.A. 209). On September 20, 1996, five residents of the Downtown Homes formed the Samuel Madden Homes Cooperative, Inc., specifically for the purpose of organizing an attempt to buy the Downtown Homes. The newly-formed group claimed to

represent a majority of the Downtown Homes residents. ARC, however, also claimed to represent a majority of the Downtown Homes residents, and advised ARHA in writing of its intention to exercise its right of first refusal to purchase the homes.

ARHA then attempted to verify which organization held the support of a majority of Downtown Homes residents. ARHA found that each organization listed in support of its representation thirty-seven residents' names that also appeared on the other organization's list. After those thirty-seven names were stricken from the lists, neither organization held a majority. ARHA indicated it would seek guidance from HUD as to which organization represented the Downtown Homes.

The parties dispute what recommendation ARHA received, but ARHA subsequently notified both ARC and the Samuel Madden Homes Cooperative by letter that ARHA would recognize neither organization as the resident council for the Downtown Homes because neither group represented a majority of the Downtown Homes' residents. The letter concluded that the best course was for the Samuel Madden residents to represent themselves by forming their own resident council.

On February 26, 1997, ARHA sent a letter to the Downtown Homes residents urging them to form their own resident council. That same day, ARHA notified the Downtown Homes residents that an election of officers for a

new resident council would take place on March 31, 1997. At the election, the same five residents who had formed the Samuel Madden Homes Cooperative formed SMHTC and elected each other as SMHTC's officers.[4] On April 18, 1997, ARHA issued to SMHTC a notice of opportunity to purchase the Downtown Homes. ARHA did not issue such a notice to ARC.

ARC filed this action against ARHA in the United States District Court for the Eastern District of Virginia on March 27, 1997, alleging, pursuant to 42 U.S.C. § 1983, that ARHA's refusal to give ARC the opportunity to buy the Downtown Homes was a violation of its members' legal rights under 42 U.S.C. § 1437p(b) and 24 C.F.R. § 970.13, and a breach of the latest Memorandum of Understanding formed between ARC and ARHA. Specifically, the complaint alleged that ARC was entitled under contract, federal statute and HUD regulations to receive an offer of first refusal to purchase the Downtown Homes. The complaint sought, among other related relief, a declaration that ARC was the recognized and duly-elected resident council for the Downtown Homes, entitled to receive the right of first refusal.

On April 28, 1997, SMHTC filed a motion to intervene as a party defendant, which the district court granted on May 16, 1997. On July 17, 1997, ARC filed a

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[4]There is no evidence to indicate that anyone other than these five residents voted in this election.

motion for summary judgment. On August 8, 1997, the district court heard oral argument on the motion for summary judgment and took the matter under advisement. On August 28, 1997, SMHTC filed a motion to dismiss the action pursuant to Federal Rule of Civil Procedure 12(b)(6), on the grounds that (1) the action was equitably moot since ARHA had already offered the Downtown Homes to SMHTC, and (2) ARC was not entitled to purchase the Downtown Homes because ARC was not a validly organized resident council under the regulations.

The parties strenuously disagreed on ARC's proper classification. ARHA and SMHTC argued that, because ARC represents the vast majority of all public housing residents in Alexandria, ARC must be considered to be an HA-wide resident council. According to ARHA and SMHTC, under 42 U.S.C. § 1437p(b)(1) and 24 C.F.R. § 970.13, HA-wide councils such as ARC are not entitled to receive first refusal offers to purchase housing units slated for demolition or disposition.[5]

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[5]Section 1437p of 42 U.S.C. provides, in pertinent part: The Secretary may not approve an application [to dispose of a public housing project] unless--

> (1) the application from the public housing agency has been developed in consultation with tenants and tenant councils, if any, who will be affected by the demolition or disposition, and the tenant councils . . . of the project or portion of the project covered by the application, if any,

ARC, on the other hand, argued it is merely a local resident council that happens to represent several housing complexes. According to ARC, it cannot be considered to be an HA-wide

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> have been given appropriate opportunities to purchase the project or portion of the project covered by the application . . . .

42 U.S.C. § 1437p(b)(1). Section 970.13 of 24 C.F.R. provides, in pertinent part:

> (b) Opportunity for residents to organize. Where the affected development does not have an existing resident council . . . at the time of the [public housing authority's] proposal to demolish or dispose of the development or a portion of the development, the [public housing authority] shall make a reasonable effort to inform residents of the development of the opportunity to organize and purchase the property proposed for demolition or disposition. . . .
>
> (c) Established Organizations. Where there are duly formed resident councils . . . at the affected development, the [public housing authority] shall follow the procedures beginning in paragraph (d) of this section. . . .
>
> (d) Offer of sale to resident organizations. (1) . . . The [public housing authority] must offer to sell the property proposed for demolition or disposition to . . . the resident council . . . of the affected development under at least as favorable terms and conditions as the [public housing authority] would offer it for sale to another purchaser . . . .

24 C.F.R. § 970.13(b), (c), (d)(1).

resident council because it does not represent all public housing units in Alexandria.

In a published Memorandum Opinion and Order dated September 24, 1997, the district court granted ARC's motion for summary judgment and denied SMHTC's motion to dismiss. See Alexandria Resident Council v. Alexandria Redevelopment & Hous. Auth., 979 F. Supp. 409, 415-16 (E.D. Va. 1997). In resolving the dispute, the district court thoroughly examined the requirements of a local resident council as set forth in 24 C.F.R. § 964.115 and various other regulatory provisions. See id. at 412-415. The district court stated it was undisputed that ARC met all of these requirements, and listed many of the activities in which ARC was involved as a resident council. See id. at 413. The district court accepted ARC's argument that ARC cannot be an HA-wide resident council because it does not represent Ladrey. See id. at 414. The district court instead found ARC to be a local resident council entitled to the right of first refusal to purchase the Downtown Homes. See id. at 415. The district court also noted that ARHA had officially recognized ARC as the resident council, and had never officially withdrawn that recognition. The district court held that, under 24 C.F.R. § 964.18(a)(7), ARHA was prohibited from recognizing a competing resident council once a duly-elected resident council had been established. See id. Finally, the district court found that, even if ARC were an HA-wide resident organization, the latest Memorandum of

Understanding comprised a secondary, contractual basis on which to find that ARC was entitled to a right of first refusal to purchase the Downtown Homes. See id.

The district court also denied SMHTC's motion to dismiss. See id. at 415-16. The district court reiterated its finding that ARC was a properly organized resident council under the regulations, and rejected ARHA and SMHTC's equitable mootness argument because the regulations prohibited ARHA from recognizing a competing resident council. See id. at 416. The district court therefore ordered that: (1) ARHA recognize ARC as the duly-elected resident council for the Downtown Homes; (2) ARHA be enjoined from selling the Downtown Homes without giving ARC the right of first refusal to purchase the property; (3) ARHA perform its obligations under the Memorandum of Understanding; and (4) costs and reasonable attorneys' fees be paid to ARC. See id.

On October 20, 1997, SMHTC filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6). In support of its motion, SMHTC relied on a letter from HUD Assistant General Counsel Michael Reardon that SMHTC argued supported ARHA and SMHTC's position that ARC could not receive the offer of first refusal to purchase the Downtown Homes. The district court rejected the letter in favor of its own interpretation of the statute and regulations, and denied SMHTC's motion to dismiss.

ARHA and SMHTC filed timely notices of appeal from both the district court's orders.

II

The district court granted ARC's motion for summary judgment, and denied ARHA and SMHTC's Rule 12(b)(6) and 60(b)(6) motions, based on three alternative grounds: (1) ARC was the resident council of the Downtown Homes under the statute and applicable regulations entitled to receive the right of first refusal to purchase the Downtown Homes; (2) under 24 C.F.R. § 964.18(a)(7), ARHA is prohibited from recognizing a resident council other than ARC; and (3) the latest Memorandum of Understanding contractually gives ARC the right of first refusal to purchase the Downtown Homes. See Alexandria Resident Council, 979 F. Supp. at 414-15. Because we conclude that 24 C.F.R. § 964.18(a)(7) directly applies, we affirm the district court's judgment in favor of ARC.

We review de novo an order of the district court granting summary judgment. See Higgins v. E.I. DuPont de Nemours & Co., 863 F.2d 1162, 1167 (4th Cir. 1988). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R.

Civ. P. 56(c). We also review de novo the denial of a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). See Martin Marietta Corp. v. International Telecomm. Satellite Org., 991 F.2d 94, 97 (4th Cir. 1992). Only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" will we affirm such a dismissal. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Finally, we review an order denying a Rule 60(b)(6) motion for abuse of discretion. See Werner v. Carbo, 731 F.2d 204, 206 (4th Cir. 1984).

Section 964.18(a)(7) of 24 C.F.R. states:

> In no event shall HUD or a HA recognize a competing resident council once a duly elected resident council has been established. Any funding of resident activities and resident input into decisions concerning public housing operations shall be made only through the officially recognized resident council.

24 C.F.R. § 964.18(a)(7). The record is clear that, for nearly ten years, ARHA recognized ARC as the official resident council representing the Downtown Homes. Neither ARHA nor SMHTC has asserted that ARHA ever revoked its recognition of ARC as the resident council for the Downtown Homes, nor have they directed us to any law that would

authorize ARHA to revoke that recognition.[6] Instead, ARHA and SMHTC argue that ARC is not a duly-formed resident council under the regulations. We disagree.

To receive official recognition from HUD and/or the local HA, a resident council must consist of persons residing in public housing and represent residents residing (1) in scattered site buildings; (2) in areas of contiguous row houses; (3) in one or more contiguous buildings; (4) in a development; or (5) in a combination of these buildings or developments. See 24 C.F.R. § 964.115(a). In addition, the resident council must meet the following requirements:[7]

> (b) It must adopt written procedures such as by-laws, or a constitution which provides for the election of residents to the governing

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[6]As the district court's opinion implied, see Alexandria Resident Council, 979 F. Supp. at 415, and as our extensive research has confirmed, the only time an HA may withdraw recognition under the regulations is when HUD requires the HA to withdraw recognition because the resident council either failed to satisfy HUD's minimum requirements for fair and frequent elections, or failed to follow its own established election procedures. See 24 C.F.R. § 964.130(b). However, ARHA and SMHTC have not alleged in this case that ARC's election procedures were in any way flawed.

[7]In addition to the requirements listed below, mandatory election procedures are set forth in 24 C.F.R. § 964.130. However, as we noted above, neither ARHA nor SMHTC have alleged any improprieties in any of ARC's elections.

board by the voting membership of the residents residing in public housing, described in paragraph (b) of this section, on a regular basis but at least once every three (3) years. The written procedures must provide for the recall of the resident board by the voting membership. These provisions shall allow for a petition or other expression of the voting membership's desire for a recall election, and set the number of percentage of voting membership ("threshold") who must be in agreement in order to hold a recall election. This threshold shall not be less than 10 percent of the voting membership.

(c) It must have a democratically elected governing board that is elected by the voting membership. At a minimum, the governing board should consist of five (5) elected board members.

The voting membership must consist of heads of households (any age) and other residents at least 18 years of age or older and whose name appears on a lease for the unit in the public housing that the resident council represents.

24 C.F.R. § 964.115(b), (c).

The record is clear that ARC satisfies these requirements. First, ARC represents scattered-site housing developments throughout Alexandria as permitted by 24 C.F.R. § 964.115(a)(5). Second, ARC's articles of incorporation and by-laws establish a five-member board of directors. And third, the board of directors is democratically elected or recalled by the residents of the housing projects ARC represents who are eligible to vote. Thus, ARC was entitled to recognition by ARHA as the duly-elected resident council representing the Downtown Homes, see 24 C.F.R. § 964.18(a) ("A HA shall officially recognize a duly elected resident council as the sole representative of the residents it purports to represent, and support its tenant participation activities."), and over the past decade ARHA has repeatedly recognized ARC as such. Section 964.18(a)(7) is clear that ARHA may not now recognize another resident council that purports to represent the Downtown Homes. Consequently, we conclude that ARC is the only organization that may receive the offer of first refusal to purchase the Downtown Homes.

III

For the reasons stated above, the judgment of the district court is hereby

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ALEXANDRIA RESIDENT	)	
COUNCIL, INCORPORATED,	)	
Plaintiff-Appellee,	)	
v.	)	
SAMUEL MADDEN HOMES	)	
TENANT COUNCIL, a/k/a	)	
Samuel Madden Homes	)	No. 97-2501
Cooperative, Incorporated,	)	
Defendant-Appellant,	)	
and	)	
ALEXANDRIA	)	
REDEVELOPMENT &	)	
HOUSING AUTHORITY,	)	
Defendant.	)	

ALEXANDRIA RESIDENT	)	
COUNCIL, INCORPORATED,	)	
Plaintiff-Appellee,	)	
v.	)	
ALEXANDRIA	)	
REDEVELOPMENT &	)	
HOUSING AUTHORITY,	)	
Defendant-Appellant,	)	

and	)	
SAMUEL MADDEN HOMES	)	
TENANT COUNCIL, a/k/a	)	
Samuel Madden Homes	)	No. 97-2502
Cooperative, Incorporated,	)	
Defendant.	)	

On Petition for Rehearing
with Suggestion fox Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

IN THE UNTIED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ALEXANDRIA RESIDENT	)	
COUNCIL,	)	
Plaintiff,	)	
v.	)	Civil Action No.
ALEXANDRIA	)	97-427-A
REDEVELOPMENT AND	)	
HOUSING AUTHORITY,	)	
Defendant,	)	
SAMUEL MADDEN HOMES	)	
TENANT COUNCIL,	)	
Intervenor-defendant.	)	

MEMORANDUM OPINION

Plaintiff Alexandria Resident Council, Inc. ("ARC") has brought this action against defendant Alexandria Redevelopment and Housing Authority ("ARHA"), asserting that it is the resident council for the public housing project known as the Samuel Madden Homes and that this status gives it the right to make a first refusal offer to purchase that public housing project. Samuel Madden Homes Tenant

Council ("SMHTC")[1] challenges ARC's claim to be the relevant resident council and seeks to dismiss the action. The key issue in this litigation is which entity is properly qualified to be the resident council under the applicable regulations. ARC has moved for summary judgment.

I.

The Samuel. Madden Homes is a 166-unit brick townhouse development in Old Town Alexandria. This action involves the "downtown" portion of the development which consists of 100 units ("the downtown homes"). ARHA owns and manages the downtown homes and leases the units at reduced rates to eligible low-income persons in exchange for subsidies from the Department of Housing and Urban Development ("HUD").

ARC is a tenant organization representing public housing tenants across Alexandria.[2] ARC is a non-stock corporation with no corporate members and is managed by a Board of Directors. According to its bylaws, the members of the Board of Directors must live in public housing in Alexandria and must elected by Alexandria public housing residents.

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[1]On May 16, 1997, this Court granted SMHTC leave to intervene as a defendant in this action.

[2]In fact, ARC represents all Alexandria public housing tenants except for the residents at the Ladrey Seniors Highrise, who are represented by the Ladrey Advisory Council ("LAC").

On February 25, 1991, ARC and ARHA entered into a Memorandum of Understanding that set forth the elements of their partnership agreement with respect to providing programs and services to the public housing residents that ARC represents.[3] Since that time, ARC has initiated several programs in Alexandria public housing developments, including the downtown homes. Such programs include anti-drug activities, resident initiatives training, economic development and self-sufficiency, resident management, and home ownership. Two residents of the downtown homes won offices in ARC's most recent elections on November 22, 1996, as vice president and historian. ARHA has provided ARC: with a vacant unit in the downtown homes to use an its office.

ARC maintains that since its recognition by ARHA, it has received annual funding based an the total number of units that it represents. ARHA most recently issued funds to ARC for tenant participation activities in January 1997. In addition to the funds received from ARHA, ARC received a grant from HUD to address ARC's goals of reducing crime and drug abuse in the public housing units, increasing educational and employment opportunities for residents, and enhancing the physical environment.

In 1994, ARHA convened a task force to study the

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[3]The 1991 Memorandum of Understanding was the first of several consecutive agreements, the most recent being executed on December 17, 1996, and expiring on December 31, 1998.

options regarding redevelopment or rehabilitation of the Samuel Madden Homes, ARC supported rehabilitation of the units; however, the task force was divided, and on March 25, 1996, ARHA voted to redevelop the downtown homes. ARC maintains that thereafter it advocated for returning as many current residents as possible to the redeveloped site.

On August 15, 1996, ARHA issued a "Notice of Opportunity to Organize" to residents of the downtown homes stating that "[b]ecause ARC represents all ARHA public housing residents, ARC does not qualify as the resident organization representing Samuel Madden Homes (Downtown) residents." ARC asserts that this notice was the first time that its representation of the downtown homes had ever been questioned. On September 20, 1996, five residents of the downtown homes formed the Samuel Madden Homes Cooperative, Inc., specifically for the purpose of organizing to attempt to buy the downtown homes. In response to the ARHA Notice, the newly formed group claimed to represent a majority of the downtown residents. ARC, however, also claimed to represent a majority of the downtown residents and on September 30, 1996, advised ARHA in writing of its intention to exercise its right of first refusal purchase the homes.

It appears that when ARHA attempted to verify which organization actually represented a majority, it found that among the downtown residents that each organization listed in support of its representation, thirty-seven names appeared

on both lists. After those thirty-seven residents were stricken from the lists, neither organization had a majority. ARHA therefore issued another notice on November 5, 1996, indicating that it would seek guidance from HUD.

It appears that HUD notified ARHA that HUD was not responsible for making the decision regarding which organization ARHA should recognize as the resident council for the downtown homes, but that ARC was eligible to represent those residents. It also appears that HUD indicated that the Samuel Madden Homes Cooperative, Inc. did not follow HUD election procedures and that the group therefore could be considered "illegal."

Rather than accepting ARC as the resident council an February 26, 1997, ARHA followed up with a letter to the presidents of both organizations explaining that ARHA could recognize neither as the resident organization because neither group represented a majority of the residents of the downtown homes. That letter concluded that the "best course is for the Samuel Madden residents to represent themselves, by forming their own tenant council."

Also on February 26, 1997, ARHA sent a letter to the downtown residents, urging them to form their own tenant council. On that same day, ARHA notified the downtown residents that an election of officers for a new tenant council would take place an March 31, 1997. On that date, the same five residents who had formed the Samuel Madden Homes Cooperative voted and elected each other as the officers of the

Samuel Madden Homes Tenant Council ("SMHTC"). There is no evidence to indicate that anyone other than these five residents voted in this election. On April 18, 1997, AREA issued a notice of Opportunity to purchase to SMHTC. ARHA did not issue such a notice to ARC.

On March 27, 1997, ARC brought this civil action against ARHA, alleging that not giving ARC the opportunity to buy the homes was a violation of its members' constitutional rights under 42 U.S.C. § 1983 and a breach of the Memorandum of Understanding between the parties. ARC points to that portion of the Memorandum of Understanding which states that one of the goals of the parties is: "To make available to ARC (in accordance with HUD's regulations) when pre-existing conditions provide for the sale of any ARHA property, first right of refusal to purchase. Accordingly, ARC asserts that it is the bona fide resident council for the tenants of the downtown homes and that, as such, it has a right of first refusal, pursuant to federal law and the Memorandum of Understanding between ARC and ARHA to purchase the downtown units before their being redeveloped. In its Complaint, ARC seeks various forms of declaratory and injunctive relief.[4]

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[4]Among the relief requested is a declaration that ARC is the recognized and duly elected resident council for the downtown Samuel Madden Homes; a declaration that plaintiff is entitled under federal law and its contract to after to purchase the property; a declaration that defendant has violated plaintiff's rights under

III.

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Evans v. Technologies Applications & Serv. Co*, 80 F.3d 954, 956 (4th Cir. 1996). This action is ripe for summary judgment disposition because there does not appear to be any disagreement as to the material facts of the case. In fact, the parties agree that the only issue in this action is whether ARC is the resident council for the downtown homes under the applicable regulations and therefore entitled to a right of first refusal to purchase the downtown homes.

The heart of the analysis is to determine whether ARC satisfies the definition of a resident council under the regulations.[5] The requirements for a resident council are set forth at 24 C.F.R. § 964.115 (1996). To receive official recognition from HUD and the relevant public housing

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federal law; a permanent injunction that defendant cannot sell the property without first giving plaintiff an opportunity Co buy; an order requiring defendant to perform its contractual obligation; and an award for costs and attorney fees.

[5]SMHTC's Motion to Dismiss raises this precise issue; therefore, this determination also will resolve that motion, as discussed below.

authority and to be eligible to receive funds for resident council activities, the council must consist of persons residing in public housing and represent residents residing:

(1) in scattered site buildings;

(2) in areas of contiguous row houses;

(3) in one or more contiguous buildings;

(4) in a development: or

(5) in a combination of these buildings or developments.

Id. § 964. 115 (a). In addition, a resident council must meet the following requirements:

> It must adopt written procedures such as by-laws, or a Constitution which provides for the election of residents to the governing board by the voting membership of the residents residing in public housing . . . on a regular basis but at least once every three (3) years. The written procedures must provide for the recall of the resident board by the voting membership. These provisions shall allow for a petition or other expression of the voting membership's desire for a recall election, and set the number of percentage of voting membership ("threshold") who must be in agreement in order to hold a recall election. This threshold shall not be less than 10 percent of the voting membership.

It must have a democratically elected governing board that is elected by the voting membership. At a minimum, the governing board should consist of five (5) elected board members.

The voting membership must consist of heads of households (any age) and other residents at least 18 years of age or older and whose name appears on a lease f or the unit in the public housing that the resident council represents.

Id. § 964.115 (b) , (c). In addition, the following election procedures are mandatory for a resident council:

(1) All procedures must assure fair and frequent elections of resident council members--at least once every three years for each member.

(2) Staggered terms for resident council governing board members and term limits shall be discretionary with the resident council.

(3) Each resident council shall adopt and issue election and recall procedures in their by-laws.

(4) The election procedures shall include qualifications to run for office, frequency of elections,

procedures for recall and term limits if desired.

> (5) All voting members of the resident community must be given sufficient notice (at least 30 days) for nomination and election. The notice should include a description of election procedures, eligibility requirements, and dates of nominations and elections.

Id. 5 964.130(a).

It is undisputed that ARC meets all of these requirements. In addition, ARC has received official recognition from HUD and ARHA and has received funds for tenant activities, most recently in January 1997. ARC holds monthly meetings and is involved in drug prevention-type activities and conducts annual inspections of each public housing site. At ARC's most recent elections on November 22, 1996, two tenants of the downtown homes took office as vice president and historian. Moreover, ARHA has provided ARC with a vacant unit in the downtown homes to use as its office, as contemplated by the regulations with respect to resident councils. *See id.* § 964.18 (a) (5).

In opposition to the plaintiff's summary judgment motion, defendants argue that ARC is not a resident council, but rather a jurisdiction-wide resident council. Defendants assert that under federal law, only the resident council at the affected site, and not the jurisdiction-wide resident council, shall have the right to make an offer to buy the units before redevelopment. *See* 42 U.S.C. § 1437p(b)(1) (1994); 24

C.F.R. § 970-13(d). The defendants argue that ARC's status as a jurisdiction-wide resident council therefore precludes it from being entitled to receive an opportunity to purchase the downtown homes. Defendants maintain that applicable federal law and legislative history support their position.

Section 18(b) of the U.S. Housing Act of 1937, 42 U.S.C. §1437P (b)(1) , requires HUD to review housing agencies" plans to replace existing housing and requires the housing agency to develop its plan in consultation with tenants and tenant councils. In 1990 this section was amended by Section 412 of the National Affordable Housing Act to require that "tenant councils if any, [be] given appropriate opportunities to purchase the project or portion of the project covered by the application. . . ." This amendment did not make clear who was eligible to receive opportunities to purchase.

Congress further amended the applicable law when it passed section 116(a) of the Housing and Community Development Act pursuant to which the housing authority must extend the opportunity to purchase only to the residents at the affected development, ARHA argues that the legislative history suggests that ARC does not qualify as a resident organization at the affected development:

> The committee bill amends the public housing demolition and disposition requirements of section 18 of the 1937 Act to clarify that [public housing authorities] must consult with the tenants or tenant

> councils of the project or portion of a project covered by the demolition or disposition application. The Committee has added this provision to make clear the consultation requirement applies only to the tenants of the subject project (or portion thereof) proposed for demolition or disposition and not to all tenants occupying any public housing owned by the [public housing authority] proposing the demolition or disposition.

H.R. Rep.,. No. 102-760, at 86 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3281, 3365-66. After this new legislation was passed, HUD issued a Notice to Regional Administrators, Directors and Offices of Public Housing to clarify the "Notice of guidelines for resident organization opportunity to purchase" that appeared in the Federal Register on October 6, 1992. *See* 57 Fed. Reg. 46,074 (1992). The notice requires housing authorities to make the offer of purchase %%exclusively to the resident organization(s) in the affected development," and says that housing authorities are "no longer required under Section 412 to offer the development to the [public housing authority]-wide resident organization."

Defendants point out that HUD issued final rules implementing the Housing and Community Development Act of 1992. *See* 60 Fed. Reg. 3706 (1995). These rules provide:

> Section 116 (a) of the Housing and Community Development Act of 1992 amended section 18 of the U.S. Housing Act of 1937 to require (public housing

> authorities) to limit the opportunity to purchase the development or portion of development proposed for demolition or disposition only to the resident organization(s) at the affected development. This provision clarifies an ambiguity regarding the breadth of the offer.

Id. In addition, defendants note that HUD Assistant Secretary for Public and Indian Housing issued a memorandum on July 25, 1995, to the office of Public Housing Directors that stated: "N.B. the [housing authority] is *no longer required* to offer the property *to the [housing authority]-wide resident organization*." (emphasis in original). In light of these interpretations of the law, defendants argue that ARC does not have a statutory right of first refusal to purchase the downtown homes.

Although there is some indicia that ARC is a jurisdiction-wide resident council given the large percentage of public housing residents that it represents,[6] ARC argues that it is not a jurisdiction-wide resident council because it does not represent all public housing residents under ARHA's jurisdiction. ARC maintains that it cannot represent all public housing residents in Alexandria because of the presence of the LAC, which represents public housing tenants in the Ladrey Senior Highrise building in Alexandria. ARC also points out

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[6]In fact, ARC stated in its Complaint that it was the jurisdiction-wide resident Council. This averment, however, is not fatal.

that funding of resident councils must be based an the number of units that each resident council represents. *See* 24 C.F.R. § 964.150. ARC argues that ARHA's funding of these two resident councils, therefore, is additional proof of ARC's status as the resident council for the downtown homes, and not as a jurisdiction-wide resident council. ARC notes that it was the LAC, and not ARC, that received the per-unit funding for the residents of the Ladrey Senior Highrise in January 1997.

ARC further argues that even if it did represent all public housing tenants it would not be a jurisdiction-wide council under the regulations because it was not formed by the coming together of multiple resident councils as the regulations contemplate. *See id.* § 964.105(a). The regulations provide that a jurisdiction-wide resident council is an umbrella-type of organization whose role is merely to advise with respect to housing authority policy. *See id.* § 964.105 (b). The Court notes that ARC's role in the Alexandria public housing community has never been limited to one of a mere advisor. Moreover, other than the LAC, with which ARC has no affiliation, there is no other resident council in Alexandria whose interests ARC could have represented. As ARC correctly points out in its brief, it was neither formed as, nor does it function as, a jurisdiction-wide resident council within the meaning of 24 C.F.R. § 964.105(a). Rather, ARC functions as the resident council for each of the housing units that it represents. Thus, this Court

finds that ARC is not a jurisdiction-wide resident council within the meaning of the regulations.

Although ARC does not satisfy the requirements of a jurisdiction-wide resident council under the regulations, it clearly satisfies the requirements of a resident council, as discussed above. Indeed, that ARHA disputes ARC's status as a resident council is puzzling in light of the history between the parties. As ARC points out, public housing residents have a right to organize and elect a resident council to represent their interests. The applicable regulations provide that "[a]s long as proper procedures are followed, the [public housing authority] shall recognize the duly elected resident council to participate fully through a working relationship with the [public housing authority]." *Id.* § 964.11. The regulations further provide that public housing authorities with 250 or more public housing units "shall officially recognize a duly elected resident council as the sole representative of the residents it purports to represent, and support its tenant participation activities." *Id.* § 964.18 (a).

ARC maintains that ARHA must recognize ARC as the sole resident council for the downtown homes. The Court notes that if ARHA did not believe that ARC was the resident council for the downtown homes, it was required under HUD regulations "to withdraw recognition of the resident council

and withhold resident services funds." *Id.* § 964.130.[7] There is no evidence in the record that ARHA has made any effort to withhold resident services funds from ARC or that any other group, such as the SMHTC, has received any such funds. In addition, because ARHA has never withdrawn its recognition of ARC in the way that the regulations contemplate, it is specifically prohibited from recognizing a competing resident council such as the SMHTC. *See id.* §964.18(a)(7).

Accordingly, this Court holds that ARC is a resident council under the applicable HUD regulations and that, as such, it is entitled to a right of first refusal to purchase the downtown homes pursuant to applicable federal law. *See* 42 U.S.C. § 1437p(b)(1); 24 C.F.R. § 970.13(d). The Court finds that this ruling avoids creation of a scenario that not only is inefficient, but also fails to capitalize on the experience and organizational history of the ARC. It is the Court's assessment that in terms of relative bargaining power, ARC has far greater institutional experience and expertise than the SMHTC, even though the two organizations should have the same interest, namely the welfare of the public housing residents that they represent. Ensuring that ARC is given its statutory right of first refusal to purchase the

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[7]Although this provision pertains to election procedures of the resident council, the Court finds that it is indicative of a housing authority's general obligations upon a finding that an organization no longer qualifies as a resident council.

downtown homes maximizes the possibility that those residents will maintain their housing. The purpose of the HUD regulations cannot be to give rise to the formation of a resident council the sole purpose of which would be to make an offer to purchase. To interpret them as such would be to subvert the entire policy behind the role of a resident council. *See* 24 C.F.R. § 964.100.

The Court also finds that even if ARC were, as defendants argue, a "[housing authority]-wide resident organization" the evidence that defendants present provides only that the housing authority is not required to make an offer. Defendants cannot ignore the fact that the Memorandum of Understanding that the parties entered into on January 1, 1997, provides that one of the goals of the parties is "[t]o make available to ARC (in accordance with HUD's regulations) when pre-existing conditions provide for the sale of any ARHA property, first right of refusal to purchase."[8] ARC correctly points out that under ARHA'S theory, the right of first" refusal confirmed in the Memorandum of Understanding, would have been limited only to a proposal to demolish all of the public housing units

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[8]The Court notes that the Memorandum of Understanding is subject to the HUD regulations and cannot trump them; however, there does not appear to be any provision in the regulations that would preclude ARC from maintaining a status as both a jurisdiction-wide resident council and the duly-appointed resident Council for the downtown homes. *See* 24 C.F.R. §§ 964.105, 964.115.

in the City of Alexandria. Surely this result is not what the parties contemplated. The Court therefore finds that the Memorandum of Understanding provides a secondary basis on which to find that ARC is entitled to a right of first refusal to purchase the downtown homes.

IV.

This ruling also resolves SMHTC's Motion to Dismiss, the crux of which is that ARC does not fall within the definition of "resident council."[9] In its motion, SMHTC argues first that ARC could not be a resident council because its Articles of Incorporation state that it shall have no corporate members. The Court finds this argument unconvincing. Although ARC is a nonstock corporation with no corporate members, it in managed by a Board of Directors whose members must live in public housing in Alexandria and must be elected by Alexandria public housing residents. As fully discussed above, ARC clearly has met the requirements for a resident council set forth in the regulations.

SMHTC also argues that this action should be dismissed on the grounds of equitable mootness because SMHTC already has made an of f er to purchase the

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[9]SMHTC also argues that ARC is not a resident management corporation because it was not approved by a resident council or public housing residents. Because this Court finds that ARC is a resident council, it does not address the issue of whether it is a resident management corporation.

downtown homes. The Court finds this argument unconvincing, however, in light of its findings that ARC is the resident council for the. downtown homes, that ARHA has never withdrawn its recognition of ARC in the way that the regulations contemplate, that ARHA therefore was prohibited from recognizing a competing resident council such as the SMHTC, and that ARC was entitled to a right of first refusal. Accordingly, SMHTC's offer to purchase in no way changes the legal analysis, and SMHTC's Motion to Dismiss is denied on all grounds.

V.

For the reasons stated in this Memorandum opinion, plaintiff's Motion for Summary Judgment will be granted, SMHTC, a Motion to Dismiss will be denied, and an appropriate order will issue.

The Clerk is directed to forward copies of this Memorandum opinion to counsel of record.

Entered this 24th day of September, 1997.

/s/ Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

IN THE UNTIED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ALEXANDRIA RESIDENT COUNCIL, Plaintiff,	)	
v.	)	Civil Action No.
ALEXANDRIA REDEVELOPMENT AND HOUSING AUTHORITY, Defendant,	)	97-427-A
SAMUEL MADDEN HOMES TENANT COUNCIL, Intervenor-defendant.	)	

ORDER

For the reasons stated in the accompanying Memorandum Opinion and because this Court finds that defendant Alexandria Redevelopment and Housing Authority ARHA has violated plaintiff's rights under 42 U.S.C. § 1983 and that plaintiff, and not intervenor-defendant Samuel Madden Homes Tenant Council ("SMHTC"), is entitled under federal law and the Memorandum of Understanding between the parties to offer to purchase the downtown Samuel Madden Homes, plaintiff's Motion for Summary Judgment is

GRANTED, and it is hereby

ORDERED that judgment be and is entered against defendants and in favor of plaintiff on all counts; and it in further

ORDERED that:

(1) ARHA recognize the Alexandria Resident Council ("ARC") as the duly elected resident council for the downtown Samuel Madden Homes;

(2) ARHA be and is enjoined from selling the downtown Samuel Madden Homes without first giving ARC an opportunity to purchase such property;

(3) ARHA perform its obligations under the Memorandum of Understanding between the parties; and

(4) Costs and reasonable attorney fees be and are awarded to plaintiff.

Intervenor-defendant SMHTC's Motion to Dismiss is DENIED.

Counsel for plaintiff has thirty (30) days in which to submit the costs and attorney fees amounts to defense counsel for a response.

The Clerk is directed to forward copies of this order to counsel of record.

Entered this 24th day of September, 1997.

/s/ Leonie M. Brinkema

Leonie M. Brinkema

United States District Judge

Alexandria, Virginia

APPENDIX C

STATUTORY PROVISIONS

42 U.S.C. §§ 1437p(b)(1)

The Secretary may not approve an application or furnish assistance under this section or under this chapter unless-

(1) the application from the public housing agency has been developed in consultation with tenants and tenant councils, if any, who will be affected by the demolition or disposition, and the tenant councils, resident management corporation, and tenant cooperative of the project or portion of the project covered by the application, if any, have been given appropriate opportunities to purchase the project or portion of the project covered by the application, and contains a certification by appropriate local government officials that the proposed activity is consistent with the applicable housing assistance plan; and

24 C.F.R. §§ 964.3(b)

Subpart B of this part contains HUD policies, procedures, and requirements for the participation of residents in public housing operations. These policies, procedures, and requirements apply to all residents participating under this part.

24 C.F.R. §§ 964.3(C)(1)

Subpart C of this part contains HUD policies, procedures, and requirements for residents participating in the Tenant Opportunities Program (TOP) (replaces the Resident Management Program under Section 20 of the United States Housing Act of 1937). Resident management in public housing is viable and remains an option under TOP.

24 C.F.R. §§ 964.18(a)(7)

In no event shall HUD or a HA recognize a competing resident council once a duly elected resident council has been established. Any funding of resident activities and resident input into decisions concerning public housing operations shall be made only through the officially recognized resident council.

24 C.F.R. §§ 964.105(a)

Jurisdiction-wide resident council. Resident councils may come together to form an organization which can represent the interest of residents residing in units under a HA's jurisdiction. This can be accomplished by the presidents of duly elected resident councils forming an organization, by resident councils electing a representative to the jurisdiction-wide elections. If duly elected resident councils form such an

organization, the HA shall recognize it as the voice of authority-wide residents for input into housing authority policy making.

24 C.F.R. §§ 964.105(b)

Function. The jurisdiction-wide council may advise the Board of Commissioners and executive director in all areas of HA operations, including but not limited to occupancy general management, security, resident training, resident employment, social services and modernization priorities.

24 C.F.R. §§ 964.105(c)

Cooperation with other groups. There shall be regularly scheduled meetings between the HA and the local duly elected resident council, and the jurisdiction-wide resident council to discuss problems, plan activities and review progress.

24 C.F.R. §§ 964.115

A resident council shall consist of persons residing in public housing and must meet each of the following requirements in order to receive official recognition from the HA/HUD, and be eligible to receive funds for resident council activities, and stipends for officers for their related costs for volunteer work

in public housing:

(a) It may represent residents residing:
(1) In scattered site buildings;
(2) In areas of contiguous row houses; or
(3) In one or more contiguous buildings;
(4) In a development; or
(5) In a combination of these buildings or developments;

C.F.R. §§ 964.115(b)

It must adopt written procedures such as by-laws, or a constitution which provides for the election of residents to the governing board by the voting membership of the residents residing in public housing, described in paragraph (b) of this section, on a regular basis but at least once every three (3) years. The written procedures must provide for the recall of the resident board by the voting membership. These provisions shall allow for a petition or other expression of the voting membership's desire for a recall election, and set the number of percentage of voting membership ("threshold") who must be in agreement in order to hold a recall election. This threshold shall not be less than 10 percent of the voting membership.

24 C.F.R. §§ 970.13(b)

(b) Where the affected development does not have an existing resident council, resident management corporation or resident cooperative at the time of the PHA proposal to demolish or dispose of the development or a portion of the development, the PHA shall make a reasonable effort to inform residents of the development of the opportunity to organize and purchase the property proposed for demolition or disposition. Examples of "reasonable effort" at a minimum include one of the following activities: convening a meeting, sending letters to all residents, publishing an announcement in the resident newsletter, where available, or hiring a consultant to provide technical assistance to the residents. The Department will not approve any application that cannot demonstrate that the PHA has allowed at least 45 days for the residents to organize a resident organization. The PHA should initiate its efforts to inform the residents of their right to organize as an integral part of the resident consultation requirement under §970.4(a).

24 C.F.R. §§ 970.13(c)

(c) Where there are duly formed resident councils, resident management corporation, or resident cooperative at the affected development, the PHA shall follow the procedures beginning in

paragraph (d) of this section. Where the affected development is fully or partially occupied, the residents must be given the opportunity to form under the procedures in paragraph (b) of this section.

24 C.F.R. §§ 970.13(d)

(1) The PHA shall make the formal offer for sale which must include, at a minimum, the information listed in this paragraph (d). All contacted organizations shall have 30 days to express an interest in the offer. The PHA must offer to sell the property proposed for demolition or disposition to the resident management corporation, the resident council or resident cooperative of the affected development under at least as favorable terms and conditions as the PHA would offer it for sale to another purchaser:

60 Fed. Reg. 3706, Jan. 18, 1995

Section 116(a) of The Housing and Community Development Act of 1992 ("The 1992 Act") amended Section 18 of the U.S. Housing Act of 1937 to require PHA's to limit the opportunity to purchase the development or portions of the development proposed for demolition or disposition only to the resident organization(s) at the affected development. This provision clarifies an ambiguity regarding the breadth of the offer.

P.L. 102-550 (H.R.102-760)

Sec. 115. Public Housing demolition and disposition clarifies that consultation under the Public Housing demolition and disposition requirements Under Sec. 18(b) of the 1937 Housing Act must occur with the tenants of the project or portions of the project covered by the demolition and disposition application.

NOTICE PIH 93-17(PHA), Hud, April 2, 1993

As a consequence of the revisions to Section 18 mandated by Section 116(a) of the HUD Act of 1992, PHAs are to do the following:

A. PHA's are required to offer the development or the portions of the development, that is, dwelling units, non-dwelling units and land, proposed for demolition or disposition exclusively to the resident organization(s) in the affected development; and